UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

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| UNITED STATES OF AMERICA,<br><br>*Plaintiff,*<br><br>v.<br><br>VILLAGE VOICE MEDIA, LLC, and NT MEDIA, LLC,<br><br>*Defendants.* | Civil Action No. 1: 03CV0164<br><br>Judge Polster<br><br>Filed: 7/10/03 |

**UNITED STATES'S MEMORANDUM IN OPPOSITION TO OLIVA'S MOTION TO INTERVENE FOR PURPOSES OF APPEAL**

The United States, by and through its undersigned attorneys, hereby files its opposition to *Amicus Curiae* S.M. Oliva's motion for leave to intervene for the purpose of appealing this Court's determination that the Final Judgment is in the public interest. The Movant has not established his standing under Article III of the U.S. Constitution and has not satisfied the requirements of Fed. R. Civ. P. 24 for intervention. Accordingly, the Court should deny his Motion.

## I. STATEMENT OF FACTS

On January 27, 2003, the United States filed the Complaint in this matter to terminate the Defendants' illegal agreement to allocate markets for advertisers in, and readers of, alternative newsweeklies in metropolitan Cleveland, Ohio, and Los Angeles, California, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment. On March 28, 2003, the Movant filed a motion with this Court for leave to file his *amicus* brief. The Court granted his motion. After the sixty-day period for

public comments expired on April 21, 2003, the United States, pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (the "Tunney Act"), responded on May 2, 2003 to the written comments, including Movant's *amicus* brief. Thereafter, the Court granted Movant's motion to file a supplemental *amicus* brief. After careful consideration of the public comments, the United States did not alter its view that entry of the Final Judgment would be in the public interest. After these comments and the United States's response were filed with this Court and published in the *Federal Register*, the United States, joined by the Defendants, moved this Court to enter the proposed Final Judgment. On June 19, 2003, the Court entered the Final Judgment.

## II.
## STANDARD OF REVIEW

The Tunney Act directs the courts to look to the Federal Rules of Civil Procedure for the legal standard governing intervention. 15 U.S.C. § 16(f)(3); *Mass. School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 780 n.2 (D.C. Cir. 1997) ("*MSL*").

## III.
## ARGUMENT

As the Movant recognizes, this is an extraordinary and unprecedented Tunney Act intervention motion. *See* Movant Mot. at 3. Like the Movant, we know of no prior effort to "interven[e] in a Tunney Act proceeding for the purpose of . . . obtaining dismissal of the underlying complaint." *Id.* That, no doubt, is because a Tunney Act proceeding is not a forum for the dismissal of complaints. The purpose of the Tunney Act is "to prevent 'judicial rubber stamping' of the Justice Department's proposed consent decree." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458 (D.C. Cir. 1995) (citing H.R. Rep. No. 93-1463, 93 Cong., 2d Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6539). Would-be intervenors generally (and unsuccessfully) claim the United

States should have obtained more relief in its settlement, *e.g.*, *MSL*, 118 F.3d at 778-80, an issue plainly within the scope of the Court's Tunney Act determination. *See* 15 U.S.C. § 16(e). The Movant, in contrast, wants the United States to get no relief at all. It is not the province of a Tunney Act court to determine that the United States brought the wrong complaint, *see Microsoft*, 56 F.3d at 1458-60, still less that the United States should have brought no complaint at all. The lack of fit between the Movant's effort and the nature and purposes of the Tunney Act is reason enough to deny his motion. Despite this mismatch between action and statute, we address the Motion in conventional terms below.

## A. MOVANT LACKS STANDING TO APPEAL

As a preliminary matter, the requirement that "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986). To appeal the Court's entry of the Final Judgment, the Movant must satisfy the standing requirements of Article III. *Diamond*, 476 U.S. at 69; *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994) (intervenor seeking to appeal must have standing under Article III). When the Movant is "not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quotations and citations omitted).

The Movant must show that he has: (1) suffered an "injury in fact;" (2) which is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) which is capable of judicial redress. *Id*. at 560-61(citations omitted). To establish an injury in fact, the Movant must establish "an invasion of

a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quotations and citations omitted).

1. Movant Has Not Shown an Invasion of a Particularized Interest

First, the Movant has not established an invasion of a "particularized" interest, that is an injury that affects the Movant "in a personal and individual way." *Id*. at 561 n.1. Movant's interest in this matter is that the United States purportedly "infringed on his right to offer Tunney Act comments before the key remedy called for in the Final Judgment was carried out." (Movant Mot. at 6.) But as the *Lujan* Court noted, a person can enforce a procedural right only "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing," and that his interest is apart from "his interest in having the procedure observed." *Id*. at 573 n.8. Although the Movant filed an *amicus* brief in this matter, that alone does not elevate his standing.

The Movant has not shown any threatened particularized interest apart from his interest in procedure. He gives his address as Washington, D.C., and nothing in his filings indicates how he would be affected by the status of newsweeklies in Ohio and California. In the example the *Lujan* Court gave, a person living adjacent to the site for a proposed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement. But persons who live far away from the proposed dam would not have any concrete and particularized interests that would be affected by the dam, and therefore would lack standing. 504 U.S. at 572 n.7.

The Movant thus does not claim any "particularized" interest that would be impacted in a personal and individual way by the entry of the Final Judgment. Rather, his claim is "only a generally available grievance about government – claiming only harm to his and every citizen's

interest in proper application of the Constitution and laws." *Lujan*, 504 U.S. at 573; *see also United States v. Microsoft Corp.*, No. 98-1232 (CKK), 2002 WL 319819, at *2 and *3 n.3 (D.D.C. Feb. 28, 2002) (individual's interest in seeing that the law is adhered to is too general an interest to confer standing) (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Since the Movant raises a grievance that he allegedly shares with the public at large and is seeking relief that "no more directly and tangibly benefits him than it does the public at large," the Movant has not stated an Article III case or controversy. *Lujan*, 504 U.S. at 573-74.

2. Movant Has Not Shown That His Interest is Legally Protected

Even if one assumes that the Movant had shown a particularized interest, the Movant has not shown how that interest is "legally protected." Although Movant argues that "the lack of any case law on this subject" strengthens his arguments (Movant Mot. at 6), the Movant has not identified a single provision of the Tunney Act that precludes the Defendants from divesting during the sixty-day comment period the assets used in the publication of the *Cleveland Free Times* and *New Times LA*, which were closed pursuant to the Defendants' *per se* illegal market allocation agreement. Nor has the Movant cited any case where the court adopts the Movant's interpretation of the Tunney Act.

Indeed, the legislative history that the Movant quotes does not preclude effectuating the divestitures prior to the entry of the Final Judgment. (Movant Mot. at 5.) Instead, the House Report, to which the Movant cites, recognizes two overarching goals of the Tunney Act: first, to provide the court "the necessary information to make its determination that the proposed consent decree is in the public interest," and second, to "preserve the consent decree as a viable settlement option." H.R. Rep. No. 93-1463, *reprinted in* 1974 U.S.C.C.A.N. at 6538-39. The Movant does not dispute that the Court was provided all the information required under the Tunney Act to make its determination.

Moreover, to delay any remedial measures until after the sixty-day comment period expires might undermine the effectiveness of the relief, and compromise the usefulness of a consent decree as a settlement option.

As the Competitive Impact Statement filed in this matter states, "[g]iven that Defendants had closed the *Cleveland Free Times* and *New Times Los Angeles* in October 2002, a quick and effective remedy was necessary to reestablish competition." (CIS at 14.) In both cities, the purchasers of these assets have begun publishing alternative newsweeklies, thereby restoring the competition that was eliminated as a result of the Defendants' *per se* illegal market allocation agreement and preventing either Defendant from exercising market power in Cleveland or Los Angeles. Consequently, readers and advertisers have benefitted in Cleveland and Los Angeles as a result of the quick and effective divestiture.

Consequently, to delay these divestitures – which the Tunney Act does not preclude – would undermine one of the Act's goals, namely preserving the consent decree as a viable settlement option.[1]

3. Movant Has Not Shown That He Suffered an Actual Injury

It is questionable whether the Movant suffered *any* actual injury. The Movant was twice afforded the opportunity to file written comments, which the United States considered. Moreover,

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[1] Moreover, if one adopted the Movant's interpretation of the Tunney Act, it would compromise the usefulness of the consent decree as a viable settlement option in other antitrust contexts. As the United States explained in its Response to Public Comments, it is customary in other Tunney Act proceedings that involve mergers to permit the defendants to merge after the complaint and proposed final judgment are filed, subject to the defendants' obligations under the proposed final judgment to take steps to divest certain specified assets. In these mergers, the defendants are generally allowed to complete the merger prior to the close of the sixty-day comment period and entry of the final judgment by the court.

as the Movant disregards, and as the United States explained in its Response to Public Comments, the divestitures specified in the Final Judgment do not preclude this Court from evaluating whether entry of the proposed Final Judgment is in the public interest or declining to enter the order if it believes the settlement is unacceptable. (U.S. Response to Public Comments at 4.) As Section IV(A) of the Hold Separate Stipulation and Order further provides, the United States, after reviewing the public comments, also had the right to withdraw its consent to the proposed Final Judgment. (U.S. Response to Public Comments at 4-5.) Consequently, by divesting certain assets and refraining from any action in furtherance of their illegal market allocation agreement, the Defendants assumed the risk that the United States might withdraw its consent and proceed to trial or that this Court might decline to enter the proposed Final Judgment.

4. Movant Has Not Shown That His Injury, If Any, Is Capable of Judicial Redress

Finally, the Movant has not shown that his injury, if any, is capable of judicial redress. As the Movant argues, even if the United States or the Court adopted the Movant's position, "it would have been moot, for the damage had already been done and could not have been undone without causing substantial injury to third parties, namely the companies who purchased the divested assets." (Movant Mot. at 4.) The Movant does not ask the Court to undo these divestitures. Nor would a reversal of this Court's public interest determination in itself undo the alleged harm to the Movant, as the assets have been already divested.

Because Article III requires more than a desire to vindicate value interests, the Movant, for these reasons, lacks standing to appeal the Court's public interest determination. Accordingly, his motion for leave to intervene for the purpose of appealing this Court's determination must be denied.

## B. MOVANT FAILS TO SHOW THAT HE HAS MET THE REQUIREMENTS OF RULE 24(a)

The Movant seeks to intervene in this case as a matter of right. As the Movant concedes, Rule 24(a)(1) of the Federal Rules of Civil Procedure is inapplicable here, as the Tunney Act does not provide an unconditional right for the Movant to intervene. (Movant Mot. at 3.) To intervene under Rule 24(a)(2), the Movant must show that (1) his motion to intervene was timely; (2) he has a substantial, legal interest in the subject matter of the case; (3) his ability to protect that interest may be impaired without intervention; and (4) the parties before the court may not adequately represent his interest. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000).

The Movant has not established that he has a "substantial legal" interest in the subject matter of this case, namely the Defendants' *per se* illegal market allocation scheme. Instead, the Movant's interest relates to preserving the *status quo* during the Tunney Act proceeding. (Movant Mot. at 4-5.) As discussed in Section A above, the Movant has not shown how this interest is substantial or legally protected under the Tunney Act.[2]

## C. MOVANT FAILS TO SHOW THAT HE HAS MET THE REQUIREMENTS OF RULE 24(b)

As the Movant concedes, Rule 24(b)(1) of the Federal Rules of Civil Procedure is inapplicable here, as the Tunney Act does not provide a conditional right for the Movant to appeal. (Movant Mot. at 8.) Grant of leave to intervene under Rule 24(b)(2) lies within this Court's sound discretion, after the Movant establishes that his "claim or defense and the main action have a question of law or fact

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[2] It does not appear that the Movant is seeking to intervene to protect the public interest in competition, but if he is, Movant has not made the required "strong" showing that the United States is "not vigorously and faithfully representing the public interest" required under Fed.R.Civ.P. 24(a)(2). *See United States v. Hartford-Empire Co.*, 573 F.2d 1, 2 (6th Cir. 1978) (in affirming lower court's denial of intervention under Rule 24(a)(2), Sixth Circuit held that "private party generally will not be permitted to intervene in Government antitrust litigation absent some strong showing that the Government is not vigorously and faithfully representing the public interest.").

in common," and that intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties."

The Movant, however, has not shown that his claims and the Complaint filed in this matter share common questions of law or fact. Indeed, the Movant has not given any indication that he has a claim within the meaning of Rule 24(b). *See* Fed.R.Civ.P. 24(c) (requiring Movant to file a pleading "setting forth the claim or defense for which intervention is sought"); *Diamond*, 476 U.S. at 76 (Rule 24(b)(2) refers to kinds of claims or defenses that can be raised in courts of law as part of actual or impending law suit) (O'Connor, J., concurring). The Movant never identifies a claim that would permit him to sue or be sued by the United States or the Defendants in an action sharing common questions of law or fact with those at issue in this matter. The Movant's concern is largely that the United States should never have investigated the underlying matter and entered into this consent decree. But "[i]t is axiomatic that the Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest." *United States v. Associated Milk Producers, Inc*., 534 F.2d 113, 117 (8th Cir. 1976).

Moreover, where, as here, the Movant seeks to intervene for purposes of appeal of a Tunney Act matter, the "delay or prejudice" standard of Rule 24(b)(2) "appears to force consideration of the merits of the would-be intervenor's claims." *MSL*, 118 F.3d at 782. This is because if the attempted intervenor shows adequate grounds for upsetting the consent judgment, then although delay will be entailed, it would be hard to say that this delay is undue. *Id*. On the other hand, if the attempted intervenor is unable to show grounds for upsetting the judgment, there would be no fear of delay, but by the same token, no prospect of any gain from intervention. *Id*. at 782-83.

The Movant's two arguments, which are unrelated to the issues involved in this Court's inquiry of whether the Final Judgment is in the public interest, lack merit. First he asserts that the Complaint and Final Judgment fail to define a relevant antitrust market. (Movant Mot. at 9-11.) As an initial matter, it is well-settled that horizontal market allocation schemes are *per se* illegal under the Sherman Act. *See Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990); *United States v. Cooperative Theatres of Ohio, Inc.*, 845 F.2d 1367, 1371 (6th Cir. 1988). The Movant does not cite any legal support for his proposition that the United States must allege a relevant antitrust market (or entry barriers) for this classic *per se* violation. Moreover, the Movant has not shown how the Tunney Act is implicated by issues of market definition in the Complaint or Final Judgment. The Movant also incorrectly asserts that the definition of an alternative newsweekly in the Final Judgment is ambiguous. But the Movant does not show why it is relevant to this Court's public interest determination. The Movant's fundamental concern is that certain assets were divested during the sixty-day comment period. The Movant does not claim that the Final Judgment's definitions of these assets (namely, the *Cleveland Free Times* Assets and *New Times LA* Assets) are so vague as to prevent this Court's entry of the Final Judgment in the public interest.

The Movant's second argument is that the Final Judgment violates the First Amendment rights of the Defendants. (Movant Mot. at 11-13.) Again this goes straight to the issue of the Movant's lack of standing. The Movant does not purport to represent the Defendants, who supported the entry of the Final Judgment. And any purported interest that Movant asserts in preventing the United States from prosecuting similar cases in the future is too general and remote an interest to confer the Movant standing. Moreover, for the reasons cited in the United States's Response to Public Comments, the Movant's First Amendment claims are contrary to well-established law.

## IV.
## CONCLUSION

For the foregoing reasons, the Movant's Motion for Leave to Intervene for Purposes of Appeal should be denied.

Dated: 10 July 2003
Washington, D.C.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the foregoing Response to Public Comments via First Class United States Mail, this 10th day of July, 2003, on:

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